Supreme Court, U.S.
FILED

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Case Number

In The
Supreme Court of the United States
October, 1994 Term

ROBERT G. KILE,
Petitioner,

v.

SUPERIOR COURT OF PLACER COUNTY CALIFORNIA APPELLATE DEPARTMENT
Respondent,

ELEANORE MARY TREPANTIS,
Respondent/Real Party In Interest

ON PETITION FOR CERTIORARI TO THE SUPERIOR COURT OF PLACER COUNTY CALIFORNIA APPELLATE DEPARTMENT

BY:

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July 5, 1994

25 pp

Introduction to Questions Presented

Respondent court filed a decision affirming [two] Municipal Court judgements of dismissal - APPENDIX "A".

Petitioner filed for writ of mandate in the Third District court of Appeal for the State of California and without any opposition, denial was filed without opinion - APPENDIX "B".

Of last resort, peititioner filed for writ of review in the California State Supreme Court and without any opposition, denial was filed without opinion - APPENDIX "C".

Questions Presented

1. Whether respondent court judges had any jurisdiction / authority because of Petitioner's January 28, 1994 and February 22, 1994 filed objections Pursuant to California Code of Civil Procedure (CCP hereafter) #170.3; Whether petitioner was deprived of a legal right to disqualifications(s) because of respondent court conduct; Whether petitioner's due process rights were violated by Judges deemed disqualified?

2. Whether real party's use of an attorney in small claims court in her behalf, to obtain a dismissal without prejudice after trial had commenced, constitutes fraud on the court and miscarriage of justice?

3. Whether a reasonable person viewing the facts at the time of petitioner's two objections, would question the respondent judges impartiality and integrity of the judiciary to wit: Whether any judge may backdate an order striking a filed objection pursuant to CCP 170.3 as insufficient.

List of Parties

The title of this petition contains the names of all parties except Blue Dolphin Pool Service and real party as cross-complaint who abandoned the case pursuant to a substitution of attorneys and except for 'SAFECO Insurance Co.' who was made party Doe Defendant No. I. Although respondent court dismissed Petitioner's entire complaint, SAFECO Ins. Co. was never served any papers.

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF PLACER COUNTY CALIFORNIA

Petitioner, Robert G. Kile respectfully submits this verified petition for certiorari to this Honorable Court and requests the decision of respondent court, affirming judgments of dismissal entered on April 6, 1994, be annuled and for instructions.

Opinions Below

The pertinent portion of the respondent decision is reproduced in APPENDIX "A". The substance of which is set forth therein.

Petitioner exhausted his remedy by writ procedure and review which are reproduced in APPENDIX "B", "C".

Jurisdiction

The respondent court decision affirming judgements of dismissal and attorney fee sanctions was entered on April 6, 1994.

Constitutional Provisions and Codified Statutes Involved

1. United States Constitution - FIFTH and FOURTEENTH amendments. California State Constitution Article VI Section 13.

2. Codified statutes 28 USC 2106 and 455. ABA Code of Jud. Conduct Cannon 3C.

Statement of the Case

Real Party filed a small claims action against petitioner intending to recover an alleged $2,520.00 from an automobile accident between her and petitioner. She personally appeared in a scheduled hearing on May 6, 1992 and was allowed to fully present her claim on the merits using exhibits, diagrams and pictures. The Commissioner stated she was on the wrong side of the road after she was done.

On June 11, 1992, an ATTORNEY appeared in her behalf in a reconsideration hearing before the same small claims court with real party no where in sight.

The ATTORNEY was successful in the prosecution of the real party's interest stating the claim as an alleged assigned claim and for a dismissal [without] prejudice which were granted over petitioner's emphatic objection[s].

The ATTORNEY'S participation was unlawful and further contradicted the prior admissions in the evidence real party personally submitted and filed in the case. Real Party admitted she had been reimbursed except for a $100.00 deductible and was in fact an original creditor and not precluded from small claims procedure as porported by the ATTORNEY. Petitioner was in total shock and surprise that the court would allow this ATTORNEY to participate because [SHE] was not a party.

Both Petitioner and real party ending up in a civil suit. Petitioner filed a formal complaint. The SAME attorney filed a cross-complaint pursuant to the small claims dismissal [without] prejudice except she filed not as an "assignee", but filed as an original creditor.

The cross- complaint was dated JUNE 10, 1992.

Petitioner was steadfast and vigilent in challenging the cross-complaint as unlawful; that regardless of real party's intention, the dismissal was WITH prejudice as a matter of law for several reasons; that the ATTORNEY'S participation made the small claims dismissal void and amounted to abandonment of the claim; that Petitioner may lawfully invoke the bar of res judicata/collateral estoppel; that real party was barred from asserting the same claim and also precluded real party from asserting affirmative defenses against petitioner's complaint; that petitioner WON/PREVAILED and only the issue of damages remained.

As a consequence of challenging the cross-complaint being unlawful, thus exposing the commissioner's allowing the attorney in the small claims and further exposing the bad faith of the real party and her attorney, [PETITIONER], instead of real party, was sanctioned substantially with attorney fees and two separate dismissals of petitioner's complaint; appeal followed.

Petitioner twice filed objection to prevent respondent judges considering, hearing or determining the appeal. Petitioner has been unsuccessful in the application for a writ of madate and application for review. Currently, the judgment[s] of dismissal of petitioner's complaint with $4,500.00 in ATTORNEY fee sanctions is full circle.

Reasons for Granting the Petition

1. THE DECISION OF RESPONDENT COURT VIOLATES LEGISLATIVE MANDATE[s]

I

The core Legislative Statutes involved are codified in sections (CCP) #116.370(e), 116.420, 116.530, 170, 170.3, 577, 581 (d,e) and 1916.

When a statute authorizes prescribed procedure and the court acts contrary to the authority thus conferred, it has exceeded it's jurisdiction and the order so made is void. *Parker v. Shell Oil Co.* 55 C.A. 2d 53 (1942), *Estate of Rowe* 66 C.A. 2d 604 (1944) *In Re Jody R.* 218 Cal App 3d 1622 (1990), Any act of a disqualifed judge is absolutely void whenever brought into question and open to attack at any time. *T.P.B. v. Superior Court* 66 C.A. 3d 885, 886 (1977).

Here, in the present instance, Petitioner filed for disqualification on January 28, 1994 and respondent judges responded with an order striking it porportedly as insufficient. Then, on February 22, 1994, Petitioner re filed with evidence, that the order was untimely, including further causes, seeking a new selection of judges; said second objection was not stricken nor answered by either respondent judge.

Real party did not respond to either filed objection.

CCP 170,170.3 state that when objection is filed, a judge, who fails to consent or answer within ten days,

[SHALL] be deemed to have consented to his or her disqualifcation and replacement. Although a challenged judge has the power to order objections stricken as legally insufficient, such power must be exercised within the time limits imposed by section '170.3 (c,3)'. Having failed to do so the judge is disqualifed and has no power to act in the case - CCP 170.3 (c,4).

SEE: *Lewis v. Superior Ct.* 198 Cal App 3d 1101, 1104, *Palma v. U.S. Ind. Fasteners Inc.* 36 Cal 3d 178-179, *Urias v. Harris Farms Inc.* 234 Cal App 3d 416, 424.

Petitioner therefore, as a matter of law, is entitled to attack the decision as void for lack of jurisdiction/authority, not only on the ground that the first response was untimely, but on the added ground that the second objection was not stricken NOR answsered at all. Case law set forth specifically addresses petitioner's legal right to disqualification(s) and a writ necessary to annul the decision CCP 170.3(d).

"Once objection has been made, the judge has these options; 1. Consent. 2. Request an agreed judge to sit or act. 3. Strike the objection as insufficient. 4. File a verified answer." - *Lewis* supra.

Regarding petitioner's second objection of February 22, 1994, the failure to strike or answer is deemed admission the allegations of fact were true to wit that: Not only was striking the first objection late, but further disqualification(s) were warranted for failure to answer.

SEE: *Urias* supra 424,*State of Idaho v. Freeman* 507 F Supp 716 (1981), and *Matter of Searches Conducted on March 5, 1980* 497 F Supp 1288 (1980) "All that is necessary is some kind of probative evidence" - 1291.

"A legal necessity existed for the order of mistrial because the judge was disqualified as a matter of law from continuing to sit or act in the case. Had he proceeded, he would have offended the basic concepts of due process." *T.P.B.* supra.

It just doesn't make any legal sense that any court decision which disregards the law in any given point, could be valid; that it would be nothing more than extension of that posture . . . "the appearance of partiality / impropriety is definitely questioned". SEE: *Fredonia Broadcasting Corp., Inc. v. RCA Corp.* 569 F 2d 256, 257, *Marshall v. Jerrico Inc.* 64 Led 2d 188, 189,

II

Under California law, once trial has commenced, any request for dismissal shall be with prejudice unless good cause exists - CCP 581(e). "Any change in this policy must come from the Legislature not the courts." - SEE: *Gherman v. Colburn* 18 C.A. 3d 1049, *Fisher v. Eckert* 94 C.A. 2d 890.

Irrespective of the small claims dismissal being void because of the ATTORNEYS appearance under CCP 116.530, real party was not an assignee under CCP 116.420. Accordingly good cause did not exist and the small claims court was proper venue on May 6, 1992 under CCP 116.370(e). SEE: *Allianz Ins. Co. v. Municipal Court* 126 Cal App 3d 1046, 1047. The legal effect being real party abandoned her claim against petitioner.

As a matter of law the dismissal is [with] prejudice. The Legislature specifically precluded ATTORNEYS from small claims; specifically compelled jurisdiction over real party because she admitted she was an original creditor; and specifically allowed petitioner to invoke the bar of res judicata / collateral estoppel against real party. SEE: *Torrey Pines Bank v. Superior Court* 216 Cal App 3d 820-822, *Campbell. Security Pac. Nat'l Bank* 62 C.A. 3d 386, *Roybal v. University Ford* 207 Cal App 3d 1086:

THE SMALL CLAIMS DISMISSAL MUST BE CORREDIN THE INTERESTS OF PUBLIC IMPORTANCE, DUE PROCESS AND JUSTICE

Petitioner, was prejudiced by the Commissioner's error to allow an ATTORNEY to violate small claims procedure while at the same time illegally ignore Petitioner's objections. It was also error to grant that ATTORNEY'S request for dismissal without prejudice as a porported assigned claim when it was not.

The ATTORNEY merely alleged facts that were contradicted by the evidence in the file of the case. "A miscarriage of justice should be declared only when the court, after an examination of the entire cause is of the opinion that it is reasonably probable that a result more favorable would have been reached in absence of error . . . the erroneous ruling constitutes a miscarriage of justice within the constitutional provision." *People v. Watson* 46 C. 2d 836, *Brooks v. Great Lakes Dredge-Dock Co.* 754 F 2d 538, *Seaman's Direct Buying Service, Inc. v. Standard Oil Co.* 36 Cal 3d 770.

Petitioner has substantially been injured. Not only has petitioner been severely sanctioned unjustly in attorney fees that the inurer should have incurred in prosecuting the cross-complaint and defending against petitioner's complaint, but as a result of challenging the cross-complaint, petitioner's complaint has been dismissed twice for non payment of those alleged attorney fees; petitioner initially prevailed as a matter of law and now has lost property rights to a cause of action for damages and injuries AND further punished $4,500.00 . . . AND forced to endure the substantial hardships including stress, waste of time and expense as the direct result of real party's OWN misconduct.

Petitioner is not the only reasonable person finding the absurdity, injustice and illegality with respondent court's affirmed judgment[s] of dismissal - APPENDIX "A". The atorney fees porportedly incurred were the direct result of real party attempting to assert affirmative defenses and to state a cause of action that, as a matter of law, she did not have.

The only way real party could possibly be entitled to any dismissal and attorney fees sanctions against petitioner, would be to validate her small claims dismissal involving an ATTORNEY . . . to affirmatively prove that she was an 'assignee' and to affirmatively prove petitioner, and not real party, is guilty of bad faith; petitioner submits that is not possible and that real party would be attempting to relitigate and defend a claim barred by res judicata, in favor of petitioner, constituting vexations and harassive conduct with no probability of prevailing.

2. THE REAL PARTY INCLUDING HER ATTORNEYS SHOULD NOT ESCAPE MAKING A MOCKERY OF THE JUDICIAL PROCESS WITH THEIR CONDUCT BEING SECRETLY BANKROLLED BY AN INSURANCE CARRIER WITH DEEP POCKETS; TOTAL REVERSAL IN FAVOR PETITIONER INCLUDING A SUBSTANTIAL SANCTION WITH ADMONISHMENT/ DISCIPLINE IS WARRANTED.

Petitioner has shown this Honorable Court that real party had been fully reimbursed her alleged damages by her Insurance carrier, except for a $100.00 deductible and that she instituted a formal cross-complaint porportedly as the real party in interest involving substantially MORE than the "$100.00" in ATTORNEY fees, to recover [that] $100. This does not make sense because there is no guarantee of even prevailing. The ATTORNEY'S appearance in the small claims court and the preparation of a formal answer to petitioner's complaint, . . . and the preparation of the cross-complaint could be estimated in excess of $1,500.00 in attorney fees.

Petitioner submits that real party and her attorneys are guilty of guile and subterfuge by wilfully, knowingly and intentionally practicing deceit; that the deception was specifically designed to accomplish falshood using the attorney's porported standing as an officer of the court, as an authority, to deliberately conceal and misrepresent truth with specific intent to lead another to petitioner's disadvantage.

As petitioner stated, the cross-complaint was dated June 10, 1992 which is [before] the order of the small claims court of June 11, 1992; real party's attorney must have had information that petitioner was not privy to because the

small claims commissioner totally ignored petitioner's objections in the hearing. It therefore appears that dismissal without prejudice had already been secretly announced and that the conduct amounted to a fraud.

Specifically [because] an ATTORNEY was involved in the small claims court, there was specific [legal] knowledge that real party's claim was [NOT] an assigned claim; especially since the ATTORNEY involved was an attorney representing "SAFECO INS. CO." in other litigation[s]; SAFECO being an "assignee" and real party's insurance carrier.

Accordingly, it affirmatively appeared that securing the small claims dismissal was a fraud; that answering petitioner's complaint was artifice intended to mislead petitioner into validating what amounted to a moot answer; that filing the cross-complaint was a fraud; that the attorney fees were a fraud and being granted two dismissals of petitioner's complaint were the ultimate extension of the brazen deceptive conduct depriving petitioner of property rights and restitution for the injuries perpetrated. Real party never contradicted petitioner's allegations.

Conclusion

The respondent court should not be permitted to backdate an order striking petitioner's January 28, 1994 filed objections under the disqualification statute CCP 170.3 (c, 3). Since respondent court judges admitted backdating by failing to timely answer in rebuttal to petitioners second filed objections of February 22, 1994, disqualification existed twice as a matter of law and respondent court had absolutely no jurisdiction nor authority to sit or act in the appeal.

The respondent court decision affirming the two judgements of dismissal including the $4,500.00 in attorney fee sanctions must be annuled in the interests of petitioner's rights, justice, due process and miscarriage of justice.

Real party and her attorneys' have wasted judicial economy, and forced petitioner to waste time, money and terrible stress and anxiety protecting property rights, illegally taken by design in order to suppress a warranted judgment in favor of petitioner. This entire terrible ordeal going on over two (2) years, is the direct result of attorneys' deceptive practices in violation of their role as officers of the court, which should not be tolerated. The deep pockets of the insurance carrier have deliberately delayed petitioner's entitlement to judgment, while allowing the attorney[s] involved to get rich at no fault of petitioner.

The ATTORNEY'S conduct allegedly in behalf of real party, is exactly what the Legislature specifically intended to prevent. "Upon learning of the Commissioner's finding she was on the wrong side of the road", ['learning or suspecting an adverse decision'] real party's ATTORNEY ['reduced the litigation to a contest of logistics, trickery and deceit thereby violating the policy factors underlying the code'] - ***Gherman v. Colburn*** supra.

Petitioner prays for CERTIORARI to annul respondent court decision and for instructions or relief consistent with this petition.

Petitioner believes that exemplary damages are warranted due to the despicable conduct of the real party and her attorneys creating this terrible hardship in conscious disregard of petitioner's rights by depriving petitioner of legal rights set forth as well as injuries with the dismissal of petitioners complaint and the $4,500.00 attorney fee sanction.

Petitioner believes that all costs are recoverable stemming from the small claims case through and including all costs associated in every court involved including this Honorable Court.

RESPECTFULLY SUBMITTED THIS JULY 5, 1994

ROBERT G. KILE - PETITIONER

Verification

I, Robert G. Kile an appellant in respondent court. Appendix "A, B, C" are true and correct. I have personally prepared this petition for certiorari and have read it and am familiar with its content. As to those matters of statements of personal knowledge, I declare them to be true and correct. As to those matters of statements under information and belief, I believe them to be true and correct.

I declare under penalty of perjury that the foregoing is true and correct.
EXECUTED THIS JULY 5, 1994

ROBERT G. KILE - PETITIONER

APPENDIX A

In the Superior Court Of The State of California In and For the County of Placer Appellate Department

Filed April 6, 1994

ROBERT G. KILE, NO. SAP 0307
Plaintiff/Appellant

v.

ELEANORE MARY TREPANITIS, et al., **DECISION**
Defendants/Respondents

Plaintiff appeals from the judgment of dismissal of this action by the municipal court. Although oral argument to this court was permitted and scheduled for March 22, 1994, neither plaintiff nor defendant appeared to present arguements. This court having considered the pleadings on file herein and the briefs and other materials presented to the court, we shall affirm.

The record indicates that the lower court entered two separate dismissals of the action, on independent grounds. We shall considered each of them separately . . . (INITIAL APPENDIX ENDED HERE)".

On March 17, 1993, Judge Pro Tem Alan Thieler signed an order of dismissal for failure to comply with a February 1, 1993, order compelling plaintiff to appear and testify at deposition and to pay sanctions.

We find that order was error in that plaintiff was not given an opportunity to be heard on the issue of whether he had complied. The February 1 order provided that (1) Sanctions of $1,750. were to be paid in full by February 16*, (2) plaintiff was to appear for deposition on March 5 and answer the questions propounded, and (3) "the hearing on defendant's motion for dismissal of plaintiff's complaint is hereby continued to 8:15 o'clock a.m. March 15, 1993, *at which time said motion will be granted without further arguement unless plaintiff has fully complied in good faith with this order relative to the payment of sanctions and appearance for deposition.*" The file reflects that on March 17 defendant submitted a declaration, ex parte, stating that plaintiff had not complied and judge Thieler signed the order dismissing the case.* In *Jones v. Otero* (1984) 156 Cal App 3d 754, the trial court dismissed the action upon the representation by defendant that plaintiff had not complied with a prior discovery order. The court of appeal reversed, holding that written notice of the motion must be given "in order that the court will be fully appraised of the events occuring subsequent to the order compelling discovery." Although the motion in this case which led to the February 1 order was noticed motion to dismiss, we find that the lower court erred in not giving plaintiff the opportunity to be heard subsequent to the compliance dates, to try to deny defendant's allegations of non compliance, or at least to explain or excuse his non-compliance. However, in light of the second, independent order of dismissal discussed below, we find that the error has harmless.

While plaintiff's motion for reconsideration of the March 17 order of dismissal was pending, the defendant filed a motion to require plaintiff to post security, pursuant

to the vexatious litigant statutes, CCP #391 et seq.** on April 26, 1993, Judge Jackson Willoughby signed the order granting the motion, declaring the plaintiff a vexatious litigant, imposing additional sanctions of $2,800,*** and ordering plaintiff to post security to post security in the amount of $20,000. The order further provided that if the security was not posted within 20 days, the action would be dismissed with prejudice. There is no record that the security was ever posted, and on July 7 Judge Willoughby ordered the action dismissed.

We find that the dismissal was proper. Although an order requiring the posting of such a bond does not require findings, (*Muller v. Tanner* (1969) 2 Cal App 3d 445), this court find that the record amply supports the lower court's finding that plaintiff is a vexatious litigant.**** "When security that has been ordered furnished is not furnished as ordered, the litigation shall be dismissed as to the defendant for whose benefit it was ordered furnished." CCP 391.4 (emphasis added).

For the foregoing reasons, the judgment of the lower court is affirmed.

DATED: 4-6-94 S/"ROEDER, P.J."

S/"COUZENS, J."

S/"GADDIS, J."

**Hurtado v. Western Medical Center*
222 Cal App 3d 1204 (1990): "Furthermore, the dismissal of an action as punishment for failure to pay monetary sanctions violates a plaintiff's due process."

CCP #391.1: "In any litigation pending in any court of this state, at any time ***until final judgment is entered*, a defendant may move the court, upon notice and hearing, for an order requiring plaintiff to furnish security. The motion must be based upon the ground, and supported by a showing, that the plaintiff is a vexatious litigant and that there is not a reasonable probability that he will prevail in the litigation against the moving defendant".

***DeCesare v. Lembert* 144 Cal App 3d 25 (1983): "On appeal defendant asserts the award of attorney fees was proper as a sanction for "vexatious litigants . . . Code of Civ. Proc., #391 et seq. We conclude that insofar as the defendant was awarded attorney fees, the order was in excess of the court's power." *People v. Silva* 114 Cal App 3d 555 (1981): "The court did not err in denying the People's request for attorney fees under the "federal vexatious litigant" theory.

****Muller v. Tanner* 2 C. A. 3d 448, 464 (1969): "A judgment dismissing an action after plaintiff's failure to post security, as required by an order determining him to be a vexatious litigant, must fall where there was no evidence to sustain one of the prerequisites on which such an order must stand." (464): "The second prerequisite is that there is no reasonable probability that the Plaintiff will prevail in the litigation against the defendant".

APPENDIX "B"

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA IN AND FOR THE THIRD APPELATE DISTRICT

FILED
APR 21, 1994

ROBERT G. KILE
PETITIONER

3 CIVIL C018078
Placer SAP0307

vs.

SUPERIOR COURT, PLACER COUNTY, ET AL.
REPONDENT

ELEANORE MARY TREPANITIS
REAL PARTY IN INTEREST

By the court:

The petition for writ of mandate is denied.

DATED: April 21, 1994

SPARKS, Acting P.J.

cc: See Mailing List

APPENDIX "C"

Third Appellate District No. C018078
S039657

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

ROBERT G. KILE, PETITIONER

FILED
JUN 1, 1994

v.

PLACER COUNTY SUPERIOR COURT, RESPONDENT

ELEANORE MARY TREPANITIS, Real Party in Interest

Petition for review denied.

LUCAS
Chief Justice